BRIEF

In Support of the Petition for a Writ of Certiorari.

THE REPORT OF THE DECISION BELOW.

The decision of the court below appears at page 39 of the record and it is reported as *Kalb* v. *Feuerstein*, 116 F. 2d 775. The opinion of the bankruptcy court is found at page 22 of the record.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The basis of the jurisdiction of this court and the reasons relied upon for allowance of the writ have been set forth at pages 3 to 7 of the preceding petition for certiorari.

STATEMENT OF THE CASE.

In 1933 the respondents obtained a judgment in foreclosure against the petitioner's farm in the County Court of Walworth County, Wisconsin (R. 18, fourth paragraph).

While the farm was being advertised for sale by the state court the petitioner filed in the bankruptcy court on October 2, 1934, his farmer debtor petition under Section 75 of the Bankruptcy Act (R. 4 and 5). The petition was approved and referred to the conciliation commis-

sioner for Walworth County (R. 6, R. 8, bottom of page). The efforts of the farmer debtor to effect composition or extension failed because the respondents who held the mortgage refused to accept his proposal or to negotiate further. Report of conciliation commissioner (R. 8, top of page).

On June 27, 1935, after the decision in *Louisville* v. *Radford,* 295 U. S. 555, which held the original Section 75 (s) to be unconstitutional was announced, the conciliation commissioner made his final report and on the same day the bankruptcy court dismissed the farmer debtor's petition (R. 6 to 8, R. 9).

On August 28, 1935, the present Section 75 (s); 11 U. S. C. 203 (s), became effective. Nine days later on September 6, 1935, the appellant filed his petition reciting the decision in *Louisville* v. *Radford,* and praying for reinstatement (R. 9). On the same day an order was entered by the bankruptcy court vacating the previous order of dismissal, reinstating the case, and again referring it to the conciliation commissioner (R. 10).

While the farmer debtor proceeding was pending in the bankruptcy court after reinstatement the following events occurred in the state court: (1) the state court confirmed the sheriff's sale in foreclosure to the respondents as mortgagees (R. 14, third paragraph)[1] (R. 22, bottom of page). (2) The sheriff delivered his deed to the respondents (R. 14, fourth paragraph, R. 22, bottom of page). (3) The state court issued a writ of assistance to the respondents. (4) On March 12, 1936, the sheriff forcibly ejected the petitioner, and (5) put the respond-

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[1]The date, September 6, 1935, at record page 14, third paragraph, is a misprint for September 16, 1935. See *Kalb* v. *Feuerstein,* 308 U. S. 433, in the first paragraph of the opinion at the bottom of page 435, where the date of confirmation by the state court is stated to be September 16, 1935.

ents in possession of the farm[2] (R. 14, fourth paragraph, R. 23, top of page).

On March 17, 1936, just **five days after the sheriff had ejected the petitioner from his farm and put the respondents in possession** (R. 14, fourth paragraph, R. 23, top of page), the conciliation commissioner, without giving any notice, filed another final report (R. 10, bottom of page). On the same day the bankruptcy court dismissed the farmer debtor proceeding without notice or hearing (R. 11, bottom of page).

The petitioner has been out of possession of his farm and the respondents have occupied it continuously for five years, that is, ever since the unlawful ejectment by the sheriff on March 12, 1936 (R. 14, third whole paragraph). The issue of the right to the possession of the farm was in litigation in the courts of Wisconsin and in this court until the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433, on January 2, 1940. Following the

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[2]The events referred to all occurred in Walworth County, Wisconsin, a rural community of about 30,000 population. That they were not without widespread public knowledge and interest is indicated by their nature as set forth in the record in case No. 121, October Term, 1939, before this court in *Kalb* v. *Feuerstein*, 308 U. S. 433. That record contains a copy of the complaint filed by the petitioner against the respondents and others in the state court. At page 5 of the record in case No. 121, appears paragraph number 1 which reads as follows:

> "1. This plaintiff alleges that on the 12th day of March, 1936, the defendant, George O'Brien, and divers other persons wrongfully, and unlawfully entered upon the plaintiff's premises hereinbefore described, and in the presence of the plaintiff's wife and family, broke into the dwelling house, and with force and arms did assault and beat and abuse this plaintiff by striking and hitting him, that as a result of such abuse blood flowed from the plaintiff's head, and the said George O'Brien, together with divers other persons, they being his agents, servants and employees, did force this plaintiff and his family out of their home, and did force them into automobiles and remove the plaintiff and his family from the premises hereinbefore described."

announcement of that decision, the petitioner, having discovered that his farmer debtor proceeding had been dismissed, applied to the bankruptcy court for a rehearing of the dismissal order of March 17, 1936, and for reinstatement in order that he might have the benefits of Section 75 (R. 12 to 13, R. 13 to 17).

While this application was pending the respondents sought an order from the bankruptcy court to restrain the petitioner from entering on his farm (R. 3, bottom of page, R. 24, top of page). The bankruptcy court declined to issue such a restraining order giving as a reason that there was no power or authority to do so (R. 25, top of page, R. 26, last paragraph of the opinion). After a full hearing and a careful consideration of the circumstances of the original dismissal the bankruptcy court denied the petitioner's application for reinstatement (R. 26, next to last paragraph of opinion, R. 2, last two paragraphs of "Order Denying Application For Rehearing and Reinstatement"). Later, on the oral motion of the respondents, the bankruptcy court restrained the petitioner from entering on his farm (R. 28)

The opinion of the judge of the bankruptcy court on the application for rehearing and reinstatement and on the application for a restraining order is found at record pages 22 to 26. The final order of the bankruptcy court, denying reinstatement is at record pages 26 to 27. The final order restraining the appellant from entering upon his farm, which was granted upon the oral application of the appellees, is at record page 28.

On appeal the circuit court of appeals below affirmed the order of the bankruptcy court denying the application for reinstatement. The Appellate Court did not specifically pass upon the restraining order saying:

> "We do not see how either party to this appeal would be benefited by a decision of this quesion and we shall not discuss or decide it" (R. 39 to 44).

SPECIFICATION OF ERRORS.

1.

The petitioner respectfully contends that the bankruptcy court was without any power or authority to issue a restraining order to restrain him from going upon his farm to which he has an unassailable right of possession by the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433. The petitioner conceives that the bankruptcy court was as devoid of power to restrain him from entering upon his farm as it was devoid of power to remove him if it had found him there. Consequently he also contends that the Appellate Court should have reversed that restraining order.

2.

The petitioner further respectfully contends that the bankruptcy court should have reinstated his farmer debtor case and thus remedied the wrong done him in dismissing it without notice to him and without hearing on the same day the conciliation commissioner filed a report recommending such dismissal which report was likewise made without any notice. The petitioner therefore contends that the Appellate Court erred in affirming the dismissal order of the bankruptcy court.

SUMMARY OF POINTS IN ARGUMENT.

SUMMARY OF POINT 1.

(Briefed at Pages 15 to 17.)

It is elementary that the bankruptcy court could not restrain the mortgagor from entering on his farm. This is true whether it had or did not have jurisdiction of the mortgagor and of his farm. If it had jurisdiction under Section 75, it could not lawfully deprive the mortgagor, as farmer debtor, of his right of possession. If it did not have jurisdiction under Section 75, it had no jurisdiction whatever.

SUMMARY OF POINT 2.

(Briefed at Pages 17 to 36.)

The petitioner is entitled to have his farmer debtor proceeding reinstated so that the mandate of the statute may be complied with.

ARGUMENT.

POINT 1.

It is elementary that the bankruptcy court could not restrain the mortgagor from entering on his farm. This is true whether it had or did not have jurisdiction of the mortgagor and of his farm. If it had jurisdiction under Section 75, it could not lawfully deprive the mortgagor, as farmer debtor, of his right of possession. If it did not have jurisdiction under Section 75, it had no jurisdiction whatever.

The Procedure.

While the petitioner's application for reinstatement was being considered by the bankruptcy court the respondents moved in writing for an order to restrain the appellant from entering on his farm. The motion stated that the appellant had gone on the farm and started to plow and harrow (R. 3, bottom of page entries of April 8, 1940, "Opinion on Motion to Reinstate," R. 24, the two paragraphs at top of page). The judge denied the motion saying in his opinion at record page 25, at the top of the page:

> "The situation resolves itself to this: If the petition of Kalb for reinstatement of his proceedings under Section 75 is granted, then clearly the court has the necessary power and jurisdiction to enter an order respecting the property in question; but **if the court declines to reopen the proceedings and declines to vacate the order of this court dated March 17, 1936, then there is nothing before this court, and there would be no power or authority to enter a restraining order."**

The motion is not found in the record because no appeal was taken from its denial.

Upon a second application, this time by oral motion, the district judge granted the identical restraining order which he had on the first application declined to issue (R. 28).

We are of the opinion that the bankruptcy court was right in denying the first application and that the issuance of the restraining order upon the subsequent oral application was clearly erroneous.

Assuming the District Court Was Acting under Authority of Section 75.

Nowhere does the act countenance the ejectment of a farmer debtor from his farm or the denial of his right of possession. On the contrary, it distinctly provides in Section 75 (s) (4) that if a receiver be in possession, the property shall be **"returned to the possession of such farmer."** Also Section 75 (s) (2) second sentence, provides that the farmer debtor shall **"retain possession"** of his property (emphasis supplied).

The law would be defeated of its sole purpose if it should be held to countenance the dispossession of farmer debtors. Its sole purpose is the **"maintenance of the farm as a going concern"** with the farmer in possession to afford adequate opportunity for him to accomplish his rehabilitation (the quotation is from *Adair* v. *Bank*, 303 U. S. 350, at 357).

Assuming the District Court Was Not Acting under Section 75.

A search for authority outside of Section 75 by which the bankruptcy court could issue such a restraining order discloses none.

District courts have no jurisdiction except as expressly granted by statute. In *Kline* v. *Burke Construction Company*, 260 U. S. 226, at top of page 234, this court observed that:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other

court created by the general government derives its jurisdiction wholly from the authority of Congress."

All jurisdiction conferred upon District Courts of United States in set forth in detail in 28 U. S. C. 41. The jurisdiction of bankruptcy courts is even more restricted. No jurisdiction in the district court to deny the petitioner access to his farm has been suggested. None exists.

The Effect of the Restraining Order Is to Nullify the Decision of This Court in Kalb v. Feuerstein, 308 U. S. 433.

In *Kalb* v. *Feuerstein,* 308 U. S. 433, this court determined finally for all courts, state and federal, that the petitioner was unlawfully deprived of the possession of his farm by the illegal and void acts of the state court and of the respondents here. The effect of the restraining order granted upon the application of **the same mortgagees, restraining the same mortgagor, from entering on the same farm,** was to continue the unlawful possession by the mortgagees which was denounced by this court.

We suggest that this restraining order was inconsiderately granted and that the petitioner is clearly entitled to be restored to possession.

POINT 2.

The petitioner is entitled to have his farmer debtor proceeding reinstated so that the mandate of the statute may be complied with.

The Procedure.

1. On October 2, 1934, the petitioner filed his petition as a farmer debtor in the bankruptcy court and it was approved and referred to the conciliation commissioner (R. 5, R. 6, R. 2, folio 3, first three entries).

2. Although the case was then pending under Section 75 (a) to (r) for composition or extension and not under the original Section 75 (s) the pending case was dismissed after the original Section 75 (s) was held to

be unconstitutional in *Louisville* v. *Radford,* 295 U. S. 555.

3. On June 27, 1935, one month after the decision in *Louisville* v. *Radford,* 295 U. S. 555, the conciliation commissioner, George H. Belton, filed a final report of the proceedings for composition or extension (R. 6 to 8), in which he reported, among other things, that:

> "George H. Belton, conciliation commissioner . . . makes . . . his report . . .:"
>
> . . . . . .
>
> "Sixth: That at the first meeting of creditors, on the 26th day of November, 1934, which was thereafter adjourned by agreement and motion of attorneys to the 6th day of May, 1935, at 10 o'clock in the forenoon, the following appearances were made:
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> 1. Henry Feuerstein and Helen Feuerstein, his wife, secured creditors in person." [Then follow the appearances of fifteen other creditors.]
>
> . . . . . .
>
> "Seventh. That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; that **due effort was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept debtor's proposal, or to enter into negotiations for adjustment."**
>
> . . . . . .
>
> "Eleventh. That there was no amended petition filed in this matter."

Because statements contained in the foregoing report were subsequently contradicted by the conciliation commissioner and by the respondents and they become important in discussing this point, the following reference to later developments is here inserted. The foregoing report of the conciliation commissioner is found in the record at pages 6 to 8 and was filed June 27, 1935. At record pages 19 and 21 appear the affidavits of Henry

Feuerstein, respondent here, and of the conciliation commissioner, George H. Belton, filed March 25, 1940 (nearly five years later).

The Affidavit of Henry Feuerstein.

Henry Feuerstein swears (at the top of page 19 of the record) as follows:

> "That the allegation in the debtor's petition that on the 14th day of May, A. D. 1934, while proceedings under Section 75 of the Bankruptcy Act were pending in this court, negotiations were being carried on by the debtor with his creditors for settlement of his debts [He means '1935' as may be seen by referring to the 'petition' referred to at record page 15, in the first whole paragraph, which reads: 'Your petitioner further represents that on the 14th day of May, 1935, while his proceedings under Section 75 of the Bankruptcy Act was pending in your court, he was negotiating with his creditors for a settlement of his debts, . . .'] is erroneous for the reason that at that time no such proceedings were pending in the federal court and that no offer of compromise of any kind or description was made to this deponent or anyone acting in his behalf."

The conciliation commissioner's report at record pages 6 to 8, and the docket entries of the bankruptcy court at the bottom of page 2 and at the top of page 3 of the record show that proceedings under Section 75 were pending on May 14, 1935, and that the debtor made a proposal which was made and considered and which failed of acceptance because "the 'principal secured creditor' Feuerstein, the respondent here, refused to accept debtor's proposal, or to enter into negotiations for adjustment" (quoted from the "Seventh" paragraph of the conciliation commissioner's report at the top of R. 8). This affidavit at record pages 18 to 21 of respondent Feuerstein further states in the first full paragraph, following folio 26 at record page 20:

> "That all times from the beginning of the foreclosure of said mortgage until the 12th day of March,

> A. D. 1936, your deponent was willing and ready to cooperate with the said debtor in any manner possible."

The foregoing statement is likewise contrary to the paragraph "Seventh" in the conciliation commissioner's report at the top of record page 8, just quoted. In fact the conciliation commissioner reported that the failure of the petitioner's proposal was wholly due to respondent Feuerstein's refusal to accept it and to enter into further negotiation.

The Affidavit of Conciliation Commissioner George H. Belton.

The affidavit of conciliation commissioner George H. Belton, which appears in the record at pages 21 and 22, contains these words in the first paragraph at folio 29:

> "That at no time during the pendency of said proceedings, either under the original petition or the reinstated petition, were any such offers made in the presence of your deponent, orally or in writing."

The foregoing statement is also contrary to the same conciliation commissioner George H. Belton's report which he made to the bankruptcy court nearly five years prior as appears at paragraph "Seventh" at the top of record page 8 where he relates that the debtor's proposal failed because respondent Feuerstein refused to accept it or to negotiate further.

4. On June 27, 1935, one day after the conciliation commissioner's final report was filed, the bankruptcy court dismissed the farmer debtor petition in the words: "It is ordered that the debtor's petition filed herein under Section 75 of the Bankruptcy Act **as amended** be and the same hereby is dismissed" (R. 9) (emphasis supplied). The petition was pending under Section 75 (a) to (r) and not under Section 75 as amended by Subsection (s).

5. On August 28, 1935, the present Section 75 (s) became effective. On September 6, 1935, the petitioner

filed his "Petition for Reinstatement" (R. 9), reciting that the new amendment "provides among other things, in Subsection S, Subdivision 5 thereof, in all cases that have been dismissed by any conciliation commissioner, referee or court, because of the Supreme Court decision holding the former Subsection (s) unconstitutional, shall be promptly reinstated" . . . He prayed that his "petition heretofore filed by him and the benefits he claimed thereunder be reinstated, and he be given relief in accordance with Section 75 thereof as amended" (R. 9).

6. On the same day, September 6, 1935, the bankruptcy court ordered that "the petition heretofore filed on the second day of October, 1934" be reinstated and it vacated "the order of dismissal of June 27, 1935." The court also re-referred the case to the same conciliation commissioner, George H. Belton (R. 10).

7. From September 6, 1935, to March 12, 1936, the various acts of the state court occurred, ending in the forcible ejectment of the petitioner, which this court held to be void in *Kalb* v. *Feuerstein,* 308 U. S. 433.

8. On March 17, 1936, **five days after the forcible ejectment of the petitioner by the sheriff,** the conciliation commissioner, without notice, filed his second final report to the bankruptcy court (R. 10) showing that he had held three creditors' meetings at which the petitioner as farmer debtor and no one else attended, as follows:

> "Second: That the first meeting of creditors was set for January 22, 1936, at 10 o'clock in the forenoon, at which time **no one appeared, excepting the applicant.** Meeting was adjourned for two weeks.
>
> Third: That on the 5th day of February, 1936, at 10 o'clock the adjourned meeting was had, at which time **no one appeared, excepting applicant,** and said meeting was continued for two additional weeks.
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> Fourth: That on the 19th day of February, 1936, at 10 o'clock the second adjourned meeting was had, at which time **no one appeared, excepting applicant."**

9. On the same day the conciliation commissioner filed his report the bankruptcy court entered a second order of dismissal without notice or hearing.

There was no other action of the bankruptcy court between September 6, 1935, when the reinstated petition was referred to the conciliation commissioner, and February 28, 1940, when the farmer debtor applied for reinstatement. The docket of the bankruptcy court at record page 3 and the entire record show no intervening action of any sort in the bankruptcy court except the report of the conciliation commissioner on March 17, 1936, and the dismissal on the same day. All activity was transferred to the attempts of the petitioner to regain possession of his farm.

It appears obvious that the report of the conciliation commissioner without notice so soon after the ejectment of the petitioner from his farm by the state court was the result of a conclusion that the case was then a vain proceeding because the farmer had lost all right to his farm. It seems equally obvious that the dismissal by the bankruptcy court without notice or hearing on the same day the conciliation commissioner's report was filed was for the same reason. At that early period in the history of the farmer debtor law the procedures and concepts of straight bankruptcy still prevailed in many quarters. The opinion was stoutly maintained that the new law did not change the established rule that a foreclosure case pending in a state court which had proceeded to a decree before bankruptcy proceedings were instituted rendered the jurisdiction of the state court superior to that of the bankruptcy court. The exclusive permanent jurisdiction of the bankruptcy court in farmer debtor cases was not recognized in some places until the decision in *Kalb* v. *Feuerstein*, 308 U. S. 433. The State of Wisconsin was one of those places.

The Petitioner Complied with the Farmer Debtor Law and Obeyed the Orders of the Bankruptcy Court.

1. The petitioner filed his original petition under Section 75 and it was approved by the court as properly filed (R. 6).

2. Upon the reference of the case to the conciliation commissioner (R. 8) he filed an inventory of his estate, a statement as to his secured and unsecured creditors with their addresses and also a statement of his financial condition (R. 6 to 8).

3. He attended the creditors' meeting before the conciliation commissioner and submitted to examination by the conciliation commissioner and by his creditors. Report of conciliation commissioner (R. 6 to 8).

4. He made a proposal for composition or extension but the respondent Feuerstein, being the principal secured creditor, refused to accept or to enter into any further negotiations. Report of conciliation commissioner, paragraph "Seventh," at record page 8, also record page 16, folio 20. The conciliation commissioner reported "That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; **that due effort was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept debtor's proposal, or to enter into negotiations for adjustment"** (emphasis supplied).

5. After the bankruptcy court had dismissed his case following the decision in *Louisville* v. *Radford* and the new Section 75 (s) became effective he promptly, within nine days, prepared and filed his petition for reinstatement which was drafted in conformity with the terms of the new act in Section 75 (s) (5) providing that all dismissed cases should be "promptly reinstated." This he promptly requested and the court reinstated the case. Both the petitioner and the court followed the prescrip-

tion of the statute. The court referred the case back to the conciliation commissioner (R. 9 and 10). His report shows that from the order of reference on September 6, 1935, to January 22, 1936, nothing was done before the conciliation commissioner (R. 10 to 11).

6. The first creditors' meeting was called for January 22, 1936, "at which time no one appeared, **excepting the applicant**" (R. 11).

7. On February 5, 1936, a second, adjourned, meeting was had, "at which time no one appeared, **excepting the applicant**" (R. 11).

8. On February 19, 1936, a third, adjourned, meeting was had "at which time no one appeared, **excepting the applicant**" (R. 11).

The conciliation commissioner concludes his report (R. 10 to 11) by saying **"That the applicant failed to make any offer to creditors and failed to file an amended petition, and therefore this conciliation commissioner recommends that this petition be dismissed"** (R. 11).

9. The record is replete with references to informal attempts to settle with creditors. All other creditors, except the respondents who alone refused to accept any proposition (R. 8, paragraph at top of page) were willing to settle. "Amended Petition for Reinstatement, etc." (R. 15, beginning with the first full paragraph and continuing to the end of the paragraph at the top of page 17). "Affidavit of Henry Feuerstein" (R. 19, beginning with the second paragraph and continuing into folio 26, at R. 20).

Certainly no default is attributable to the petitioner prior to the sudden recommendation of the conciliation commissioner and the dismissal by the court all on March 17, 1936, following the illegal ejectment of the petitioner by the sheriff. It is evident that the bankruptcy court found the petition for reinstatement in proper form because the "Order of Reinstatement," at record page 10, re-

cites that "Upon reading and filing the annexed petition" the court reinstated the "petition heretofore filed" and re-referred it to the conciliation commissioner (R. 10). It was not the office of the conciliation commissioner to order the farmer debtor to file an amended petition. Neither petitions nor amended petitions are filed with a conciliation commissioner. They are filed with the clerk of the district court.

The conciliation commissioner misconceived the nature of his office. He is but a **referee** to whom the district court **refers** matters for such action as is specified in the order of reference and for report back to the district court. Proceedings may neither be initiated before a conciliation commissioner nor dismissed by him; he acts only pursuant to an order of reference. Since it is clear that he believed the proceedings were pending before him under Section 75 (a) to (r), it is difficult to understand how he could believe that the farmer debtor should file an amended petition with him before he had made his final report showing the termination of his reference thereunder.

Whether the case while pending under the reference to the conciliation commissioner was governed by Section 75 (a) to (r) or by Section 75 (s) the judge of the bankruptcy court had the petition for reinstatement and referred it as it was. If either the judge or the conciliation commissioner, upon further consideration, found a petition for adjudication also to be necessary, an appropriate order was due to be served upon the farmer debtor. If the conciliation commissioner believed he was acting pursuant to Section 75 (a) to (r) and that when he had completed his duties under Section 75 (a) to (r) an amended petition should be filed it was his duty to report his opinion to the court.

By no conception of the law could it be proper for the conciliation commissioner without notice to recom-

mend dismissal to the judge and for the judge to dismiss without notice or hearing.

As suggested in Note 2 at page 11 of this brief, it is quite likely that the ejectment actuated the conciliation commissioner. The farm of the petitioner is located in **Walworth County,** Wisconsin, and he lived upon it. "Farmer Debtor Petition" (R. 2). The conciliation commissioner was such for **Walworth County** (R. 6 to 8, R. 10 to 11). The foreclosure case was pending in the County Court of **Walworth County** and the confirmation of the foreclosure sale was there confirmed. It was the sheriff of **Walworth County** who, on March 12, 1936, ejected the petitioner from the farm and put the appellees into possession (R. 14, end of fourth paragraph). The population of Walworth County is about 30,000. It is highly probable that not only the judge and the sheriff of the county court, but the conciliation commissioner and also the clerk and the judge of the federal district court, were all of the opinion that there remained nothing upon which the case could act. It was no doubt regarded as a dry husk of legal formality from which the substance had been appropriated by the state court under its claim of prior jurisdiction assumed long before the jurisdiction of the bankruptcy court attached. Judgment in foreclosure had been entered in the County Court of Walworth County for more than a year and the farm was being advertised for sale when the farmer debtor petition was filed. "Farmer Debtor Petition" (R. 5, bottom of page).

Under ordinary bankruptcy, and indeed under the other debtor sections of the Bankruptcy Act, jurisdiction in foreclosure first obtained and proceedings conducted to final decree in a state court were not disturbed by the subsequent filing of a bankruptcy or a debtor petition. It is safe to assume that under the circumstances and the applicable law as they understand it, neither the conciliation commissioner nor the clerk nor the judge

of the bankruptcy court had any intention of depriving the farmer debtor of any legal right. They all no doubt considered the case at an end when on March 12, 1936, the petitioner was put off of and the respondents put on the farm. The dismissal five days later on March 17, 1936, was then deemed the necessary thing to do in view of the *fiat accompli* in the state court.

To the farmer debtor the application of all legal procedure had been transferred to his efforts to have the state remedy the wrong that had been done. His case, known as No. 120 in this court, was for cancellation of the sheriff's deed and for removal of the respondents from his farm. *Kalb* v. *Feuerstein*, 308 U. S. 433, at the middle of page 436.

Whatever action, or inaction, characterized the farmer debtor case in the bankruptcy court during the state litigation and the appeal to this court, it can not be said that the petitioner was guilty of any laches in assuming that the bankruptcy court would not irretrievably dismiss his farmer debtor case without prior notice to him that such action was contemplated.

Due Process of Law.

The effect of the dismissal was to deprive the petitioner of his right to have the benefits of Section 75 (s). This right has by this court been declared to be founded on the Constitution. The same Constitution in the Fifth Amendment guarantees that "no person . . . shall . . . be deprived of . . . property, without due process of law; . . ." There is no principle of law more firmly established in American and in English jurisprudence than this one. There is no exception and it is as vital a defect in judicial proceedings as the violation of the principle that a court may not act without power. An order of a court issued in violation of either of these fundamental principles is absolutely void and may be attacked at any time, at any place, by any person interested. This is

true because a court has no **power** to act except through due process of law. The bankruptcy court's dismissal without notice was as void as was the confirmation of foreclosure and the ejectment of the appellant by the Wisconsin state court. No rights have intervened to suggest any hesitancy in restoring to the petitioner what the court wrongfully deprived him of.

Due process of law has been stated in Volume 6, Ruling Case Law, in the article on Constitutional Law, Section 442, as follows:

> "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. In fact, one of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that **by due process of law was meant 'a law which hears before it condemns;** which proceeds upon inquiry, and renders judgment only after trial.' Somewhat similar is the statement that it is a rule as old as the law that **no one shall be personally bound until he has had his day in court,** by which is meant, until he has been **duly cited to appear, and has been afforded an opportunity to be heard"** (emphasis supplied).

In the recent case of *Morgan* v. *U. S.*, 304 U. S. 1, this court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasi-judicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued. At page 18, this court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable op-

portunity to know the claims of the opposing party and to meet them."

In *Holden* v. *Hardy*, 169 U. S. 366, 389 (1897), this court said:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

This pronouncement was quoted with approval and followed in *Ballard* v. *Hunter*, 204 U. S. 241 (1907), and in *Twining* v. *New Jersey*, 211 U. S. 78, 102 (1906).

In 12 Corpus Juris, "Constitutional Law," page 1228, it is said:

> **"Notice to a party** whose rights are to be affected by judicial proceedings is **an essential element of due process"** (emphasis supplied).

In *Coe* v. *Armour*, 237 U. S. 413, 426 (1914), this court said:

> "In doing this the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice."

In *Windsor* v. *McVeigh*, 93 U. S. 274 (1876), it was held that the decree of a court of equity upon oral allegations, without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way.

The Opinion of the Judge of the Bankruptcy Court Examined.

The opinion of the district judge is at record pages 22 to 26.

It is to be noted that the judge of the bankruptcy court who entered the final order of dismissal on March 17, 1936, at record page 11 was not the judge who considered the application for rehearing and reinstatement and rendered the opinion at record page 22. It is fully appreciated that it is not pleasant for any judge to be asked to reconsider an order entered by a predecessor on the bench. Yet "this is a government of laws and not of men."

We desire here to consider some of the observations contained in the opinion of the district judge upon the application for rehearing of the final order of dismissal and for reinstatement.

1. In the second paragraph on page 25 of the record the opinion refers to a supposed default by the farmer debtor in not making "any offer in writing." It refers to the affidavit of the conciliation commissioner which is found at record page 21, where the conciliation commissioner swears that he advised the farmer debtor that offers "had to be in writing in order to be valid" and that "at no time during the pendency of said proceedings, either **under the original petition** or the reinstated petition were any such offers made in the presence of your deponent, orally or in writing." This affidavit was made March 21, 1940. Evidently the conciliation commissioner had forgotten that nearly five years previously in his official report, dated June 26, 1935, and filed June 27, 1935 (R. 6 to 8), which report was made to the same court to which his affidavit was addressed, he had reported that "**due effort** was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept **debtor's proposal,** or to enter into negotiations for adjustment."

It is also to be noted that nowhere in Section 75 is there any requirement that a proposal shall be written. The law is concerned with substance and not with the form of a proposal. There are minute provisions for the consideration and acceptance and confirmation of a proposal for composition or extension of the debts of the farmer debtor but none relative to the form of the proposal. Indeed, in the Bartels case, *John Hancock* v. *Bartels*, 308 U. S. 180, there was no written proposal.

2. It is quite evident that the opinion unintentionally and inadvertently stated inaccurately at the end of the second paragraph of the opinion at record page 25, that "At the time the commissioner's report was made on **March 11, 1936,** Kalb was still in possession of his farm." The conciliation commissioner's report was filed **March 17, 1936** (R. 10). Mr. Kalb was dispossessed on **March 12, 1936** (R. 23, top of page, R. 14, end of fourth paragraph). He was not in possession when the conciliation commissioner's report was made.

3. The following is quoted from the opinion at record page 25, third paragraph, at folio 33:

> "When Kalb submitted himself to the jurisdiction of the bankruptcy court, he and his counsel were presumed to know that such proceedings are *in rem* and not *in personam;* and all persons are presumed to have knowledge of any judgments or final orders therein. **Kalb was not denied due process any more than were the Feuersteins whose proceedings in the state court were suspended without notice to them when the original proceedings were filed in this court.** Kalb instituted the proceedings and sought the protective jurisdiction of the bankruptcy court. Creditors and lien claimants were required to take notice of these proceedings. Kalb was in the same situation" (emphasis supplied).

The sentence in the preceding paragraph which is printed in bold face type is an argument presented by

mortgage holders to courts throughout the nation in controversies arising out of Section 75. The thought is that certain legislative provisions, or results of legislative provisions, call for complementary provisions by judicial legislation. The Congress considered the problem and legislated. That legislation is final. This court has declared that the "mandate of the statute" is to be followed by the courts.

The dismissal of the proceeding in the bankruptcy court without notice is quite another situation. The proceeding was pending by authority of the law of the United States pursuant to the Constitution. Under the fifth amendment that proceeding could not be dismissed without due process of law by hearing after due notice. In the words of Chief Justice Marshall "We must remember that it is a **Constitution** that we are considering."

4. The statement at the bottom of page 25 of the record that "There is no contention or claim that the Kalbs did not have actual notice that the proceedings in this case were dismissed," is not based upon the record. Emphatically the appellant claims that he had no notice of the filing of the conciliation commissioner's final report (R. 10) or of the final order of dismissal (R. 11). **May it here be suggested that controversy over the dismissal could not have occurred if by due process of law a notice to the farmer debtor to show cause had been served and he had been in default of appearance or other action before dismissal.**

5. At the bottom of page 25 and the top of page 26 of the record the opinion reads:

> "At that time [when the order of dismissal was entered] the Kalbs owed seven years' interest on their mortgage, which interest amounted to over $2,000; and five years of delinquent taxes, amounting to approximately $1,000 had accumulated."

This, again, is an argument that has been repeatedly pressed upon the federal courts, including this court, re-

peatedly as a reason for modifying the terms of Section 75 by the courts.

The Opinion of the Appellate Court Examined.

1. A minor misstatement of fact occurs at record page 40, in the first full paragraph of the opinion of the Appellate Court where it is said that "While the proceeding was pending in the district court a mortgage foreclosure was commenced" . . . The mortgage foreclosure had been pending for a year and a half when the original petition was filed in the bankruptcy court (R. 5, last two sentences).

2. The opinion of the Appellate Court at the top of record page 42 in the paragraph running over from the previous pages, says:

> "It is difficult to see how petitioner was deprived of his right to proceed under Subsection (s) by this order of dismissal. The conciliation commissioner, in his report, stated that the appellant 'failed to file an amended petition,' and the court, in its order of dismissal, stated: 'That the debtor has failed to make an offer of composition to his creditors and also failed to file an amended petition praying for adjudication of bankruptcy.' "

At the beginning of the last paragraph on the same page (R. 42), it is said:

> "It must be conceded that if appellant's petition for reinstatement of September 6, 1935, be regarded as an application under Subsection (s), that he had from that date until March 17, 1936, to amend his petition 'asking to be adjudged a bankrupt.' It appears certain that Subsection (s) is not automatic or self-executing, but that a debtor desiring the benefits thereof must assume the initiative and meet the requirements which are imposed by the statute."

It is respectfully suggested that at the present time probably one guess is as good as another in endeavoring to determine whether the bankruptcy court considered the reinstatement on September 6, 1935, at record page 10 to

replace the case under Section 75 (a) to (r) or to put it under Section 75 (s). The conciliation commissioner seems to have considered it to have been referred to him again under Section 75 (a) to (r). In either case due process of law required notice to the farmer debtor to file a formal amended petition if it was deemed necessary. The petitioner was effectually cut off from all access to the provisions of Section 75 (s) by the dismissal.

Since this dismissal was made by the bankruptcy court upon the recommendation of the conciliation commissioner which was made without notice to the farmer debtor and the dismissal itself was without notice or hearing, the petitioner is entitled to be restored to the right he had on September 6, 1935, before the dismissal. Had the court given notice and given an opportunity to file an amended petition, he would have had due process of law. Failure to comply would rightly have authorized a final order of dismissal. Certainly, in any view, he was not to be expected or required to file with the conciliation commissioner an amended petition either before or after the conciliation commissioner made his final report under Section 75 (a) to (r).

It may be conceded that Section 75 (s) is not automatically invoked and that the farmer debtor must apply for adjudication as a farmer debtor bankrupt. But he can not divine when the proper time has arrived to file such application without having notice that the proceeding under Section 75 (a) to (r) has ended. Two proceedings, one under Section 75 (a) to (r) and one under Section 75 (s), can not pend at the same time. Does not "orderly procedure" require that the court give notice when the first proceeding has ended so that, if desired, the second may be initiated?

4. At the middle of page 43 of the record the opinion of the Appellate Court suggests that:

> "Ignoring the fact that he failed to file an amended petition with the commissioner, and assum-

ing that he was not required to do so, yet the burden rested squarely upon him to do so in the court within a seasonable time. We do not see how he was relieved of his duty in this respect from the fact that his petition was dismissed. If he had made application to file such amended petition in a reasonable time, we think the court would have been obliged to permit it. According to appellant's contention, he had no notice of the order of dismissal and this, therefore, could afford him no reason or excuse for not proceeding or attempting to proceed seasonably under Subsection (s). It is, therefore, our view that the order of dismissal did not and could not have affected the rights of appellant. He is in precisely the same position as he would have been had there been no order of dismissal."

The petitioner could not be in default if he had no notice that the case was about to be dismissed if he did not act. Had there been no order of dismissal we do not see why he should be deprived of his rights to proceed under Section 75 (s).

May it be most respectfully suggested again that it is quite probable that neither conciliation commissioner nor court intended to deprive the petitioner of any right. The color of the case then was considered to be that it had ended for all practical purposes by the eviction under what was then believed to be the paramount jurisdiction of the state court. We do not believe the conciliation commissioner would have made such a report nor do we believe the bankruptcy court would have dismissed the case without notice or hearing, if it had been foreseen that it would be finally held by this court that the eviction was a nullity.

A bankruptcy court is a court of equity and in farmer debtor proceedings the bankruptcy court is required to administer the law in accordance with its general purpose to enable farmer debtors to rehabilitate themselves. Where a mistake has been made by a court or by its officers why should it not be corrected? Correction can not harm the respondents whose rights are fully protected

by the law the farmer debtor seeks to invoke. They have for five years retained their unlawful possession, wrongfully appropriating the rents and profits of the farm. The petitioner's whole attention and energy was devoted to regaining possession of his farm and in case No. 120 he was restored to his right of possession by this court. *Kalb* v. *Feuerstein*, 308 U. S. 433. To deny to the petitioner a correction of the wrong unwittingly done him while he was seeking to maintain his right of possession subjects him to irreparable injury.

CONCLUSION.

It seems to the petitioner that the order restraining him from taking possession of his farm was improper and should be remedied.

It likewise seems to him that he has been deprived of a constitutional right by the failure to reinstate his farmer debtor proceeding and consequently that the order of the Appellate Court affirming the order of the bankruptcy court in denying reinstatement ought to be remedied.

Wherefore he prays that this Honorable Court issue a writ of certiorari to the Appellate Court.

Respectfully submitted,

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Lima, Ohio,
February 24, 1941.